

EPA Region 10  
Deemed Releasable

ENFORCEMENT CONFIDENTIAL  
SIBRD Group RLSO September 15, 2020

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 10

IN THE MATTER OF:

CERCLA Docket No. \_\_\_\_

Portland Harbor Superfund Site  
Portland, Multnomah County, Oregon  
**ADMINISTRATIVE SETTLEMENT**

**AGREEMENT AND ORDER ON  
CONSENT FOR REMEDIAL DESIGN  
AT THE SWAN ISLAND BASIN  
PROJECT AREA**

Daimler Trucks North America LLC,  
Vigor Industrial LLC, ~~and~~  
Cascade General, Inc., ~~and~~  
Shipyards Commerce LLC

Respondents;

United States Maritime Administration;  
United States Coast Guard; United States  
General Services Administration; United  
States Bonneville Power Administration;  
and United States Department of Defense  
with Respect to the Department of the Navy  
and the Army Corps of Engineers,

Settling Federal Agencies;

and the State of Oregon, acting by and  
through the Oregon Department of State  
Lands; City of Portland; and the Port of  
Portland,

Settling Public Entities.

Proceeding Under Sections 104, 107, and  
122 of the Comprehensive, Environmental  
Response, Compensation, and Liability Act,  
42 U.S.C. §§ 9604, 9607 and 9622

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**Swan Island Basin Project Area Remedial Design  
Administrative Settlement Agreement and Order on Consent**

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## I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Settlement Agreement and Order on Consent (Settlement) is entered into voluntarily by the United States Environmental Protection Agency (EPA) and Daimler Trucks North America LLC, Vigor Industrial LLC, and Cascade General, Inc. (collectively, Respondent(s)); U.S. Maritime Administration, U.S. Coast Guard, U.S. General Services Administration, United States Bonneville Power Administration and U.S. Department of Defense with respect to the Department of the Navy and the Army Corps of Engineers (collectively, Settling Federal Agencies or SFAs); and the State of Oregon, acting by and through the Department of State Lands (Department of State Lands or DSL), the City of Portland, and the Port of Portland (collectively, Settling Public Entities). This Settlement provides for the performance by the Respondents of -100% Remedial Design (RD) for the Swan Island Project Area as further described by the attached Statement of Work– and the payment by Respondent(s) of certain response costs incurred by the EPA pursuant to this Settlement, and by the Oregon Department of Environmental Quality and the Tribal Governments, pursuant to separate written agreements, at or in connection with the Work conducted under this Settlement, related to the selected remedy for the in-river portion of the Portland Harbor Superfund Site (the Site).

Commented [SIBRD GRP1]: B1a Project Area ASAO

2. This Settlement is issued under the authority vested in the President of the United States by Sections 104, 107, and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9607, and 9622 (CERCLA). This authority was delegated to the EPA Administrator on January 23, 1987 by Executive Order 12580, 52 Fed. Reg. 2923 (Jan. 29, 1987), and further delegated to the EPA Regional Administrators by EPA Delegation Nos. 14-14-C (Administrative Actions Through Consent Orders, Jan. 18, 2017) and 14-14-D (Cost Recovery Non-Judicial Agreements and Administrative Consent Orders, Jan. 18, 2017). This authority has been re-delegated by the Region 10, Regional Administrator (Regional Administrator) to the Region 10, Director, Superfund and Emergency Management Division, and Program Managers thereunder by EPA Delegations R10 14-14-C and 14-14-D (April 15, 2019).

3. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the natural resource trustees for the Portland Harbor Site of negotiations with Respondents regarding the release of hazardous substances that may have resulted in injury to the natural resources under federal trusteeship and encouraged the trustee(s) to participate in the negotiation of this Settlement consistent with the process agreed to in the 2001 Memorandum of Understanding related to the Site.

4. EPA and Respondents recognize that this Settlement has been negotiated in good faith and that the actions undertaken by Respondents and the payments made by the United States on behalf of the SFAs and by Settling Public Entities in accordance with this Settlement do not constitute an admission of any liability. Respondents, SFAs, and Settling Public Entities do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Settlement, the validity of the findings of facts, conclusions of law, and determinations in Sections V (Findings of Fact) and VI (Conclusions of Law and Determinations) of this Settlement. Respondents, SFAs, and Settling Public Entities agree to comply with and be bound by the terms of this Settlement and further agree that they

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will not contest the basis or validity of this Settlement or its terms. Respondents, the United States on behalf of the SFAs, and Settling Public Entities have agreed to share the costs of the Work to be performed under this Settlement solely to facilitate the Work. This cost-sharing does not represent an assessment by Respondents or the Settling Public Entities ~~or the SFAs~~ of their liability, if any, for releases of hazardous substances within the Site or the Swan Island Basin Project Area or the equitable allocation of response costs associated the Site or the Swan Island Basin Project Area.

## II. PARTIES BOUND

5. This Settlement is binding upon EPA and upon Respondents and their successors and assigns, the United States on behalf of the SFAs, and the Settling Public Entities. Any change in ownership or corporate status of a Respondent including, but not limited to, any transfer of assets or real or personal property, shall not alter such Respondent's responsibilities under this Settlement.

6. ~~EPA contends that~~ Respondents are jointly and severally liable for carrying out all activities required by this Settlement. In the event of the insolvency or other failure of any Respondent to implement the requirements of this Settlement, the remaining Respondents shall complete all such requirements. Respondents are not jointly and severally liable for the SFAs' or the Settling Public Entities' requirements under this Settlement. SFAs and Settling Public Entities are not jointly or severally liable for Respondents' requirements under this Settlement.

Commented [SIBRD GRP2]: B1a and Wilbridge Cove ASAO

Commented [ID3]: Dean I.: Change back to Model lang.

7. Each undersigned representative of a Respondent, SFA, and Settling Public Entity certifies that she or he is fully authorized to enter into the terms and conditions of this Settlement and to execute and legally bind that Respondent, SFA, and Settling Public Entity to this Settlement.

8. Respondents shall provide a copy of this Settlement to each contractor hired to perform the Work required by this Settlement and to each person representing any Respondent with respect to the Work, and shall condition all contracts entered into under this Settlement on performance of the Work in conformity with the terms of this Settlement. Respondents or their contractors shall provide written notice of the Settlement to all subcontractors hired to perform any portion of the Work required by this Settlement. Respondents shall nonetheless be responsible for ensuring that their contractors and subcontractors perform the Work in accordance with the terms of this Settlement.

## III. STATEMENT OF PURPOSE

~~IV.~~ The purpose of this Settlement is to implement 100% (RD) at the Swan Island Basin Project Area as described in the attached SOW, including area-specific pre-remedial design sampling and related investigation to inform later RD. EPA signed a Record of Decision for the Site on January 3, 2017 (ROD) that selected Remedial Actions (RA) for the in-river portion of the Site from approximately river miles (RMs) 1.9 to 11.8. The ROD provides information about how Site data will influence pre-remedial investigation, RD, remedial construction, and future maintenance of remediated areas. The ROD states that the actual technologies assigned during RD will be dependent on a number of area-specific characteristics and environmental conditions

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to ensure that the final constructed remedy is appropriate for area-specific conditions, e.g., Sediment Management Areas (SMAs). The ROD also identifies post-ROD and RD sampling activities that will support and refine the Site's Conceptual Site Model (CSM) to implement RD and RA. Data collected since the ROD as part of the Portland Harbor Pre-Remedial Design Investigation ("Harbor-wide PDI") and Baseline Sampling Study (AECOM and Geosyntec, 2019) has been approved by EPA. EPA-sapproved Site data will be used to refine SMAs, select appropriate remedial technologies, and identify any uncontrolled sources of recontamination.

~~This Settlement does not include performance of the RA for the Swan Island Basin Project Area.~~

Commented [SIBRD GRP4]: B1a ASAO

Commented [ID5]: Dean I.: Not necessary, as RA can only occur under a CD or UAO.

#### IV. DEFINITIONS

9. Unless otherwise expressly provided in this Settlement, terms used in this Settlement that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Settlement or its attached appendices, the following definitions shall apply:

"Account" shall mean an interest-bearing banking or trust account that exists or is established by Respondents with EPA named as a beneficiary and identified as holding public funds at a depository qualified to hold public funds under ORS 295.002, for purposes of depositing and holding funds paid to Respondents by SFAs and Settling Public Entities for Work under this Settlement.

"Affected Property" shall mean all real property at the Swan Island Basin Project Area and any other real property where EPA determines, at any time, that access or land, water, or other resource use restrictions are needed to implement the Work under this Settlement.

"CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9601-9675.

"Day" or "day" shall mean a calendar day. In computing any period of time under this Settlement, where the last day would fall on a Saturday, Sunday, or federal or State holiday, the period shall run until the close of business of the next working day.

"Effective Date" shall mean the effective date of this Settlement as provided in Section XXIX.

"EPA" shall mean the United States Environmental Protection Agency and its successor departments, agencies, or instrumentalities.

"EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

"EPA Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the EPA incurs in reviewing or developing deliverables submitted pursuant to this Settlement for the Swan Island Basin Project Area, in overseeing implementation of the Work, or otherwise implementing, overseeing, or enforcing this

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Settlement, including but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Section IX (Property Requirements) (including, but not limited to, cost of attorney time and any monies paid to secure or enforce access or land, water, or other resource use restrictions, including, but not limited to, the amount of just compensation, ¶ 72 (Work Takeover), ¶ 17 (Emergencies and Releases), ¶ 96 (Access to Financial Assurance), ¶ 18 (Community Involvement (including the costs of any technical assistance grant under Section 117(e) of CERCLA, 42 U.S.C. §9617(e)), and the costs incurred by the United States in enforcing the terms of this Settlement, including all costs incurred in connection with Dispute Resolution pursuant to Section XIV (Dispute Resolution) and all reasonable litigation costs. EPA Future Response Costs shall also include, but not be limited to, direct and indirect costs paid or incurred by EPA, prior to the Effective Date, in connection with negotiating this Settlement and charged to account 10SW and account 10TC beginning on September 15, 2020. EPA Future Response Costs shall not include the costs of EPA oversight or data collected by EPA concerning any other response action or Settlement Agreement associated with the Site or other activities that do not specifically pertain to this Settlement including the implementation of the attached SOW. EPA Future Response Costs shall not include costs incurred by SFAs or costs incurred by any department, instrumentality, or agency of the United States that are not related to overseeing the Work.

**Commented [SIBRD GRP6]:** ASAOs for B1a, Wilbridge Cove and RM 7 West

**Commented [SIBRD GRP7]:** Willamette Cove ASAO

**Commented [MS8]:** Stephanie M.: 10TC is the account to which EPA bills work done that applies to and benefits every RD project, such as programmatic BA and coordination with NMFS, RD guideline development and public meetings. The 10TC bill is divided amongst all the Project Areas.

**Commented [SIBRD GRP9]:** Willamette Cove ASAO

**Commented [SIBRD GRP10]:** B1a Project Area ASAO

**Commented [SIBRD GRP11]:** Willamette Cove ASAO

“Interest” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year. Rates are available online at <https://www.epa.gov/superfund/superfund-interest-rates>.

“National Contingency Plan” or “NCP” shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

“Non-Settling Owner” shall mean any person, other than Respondents or Settling Public Entities, that owns or controls any Affected Property. The phrase “Non-Settling Owner’s Affected Property” means Affected Property owned or controlled by Non-Settling Owner.

“ODEQ” shall mean the Oregon Department of Environmental Quality and any successor departments or agencies of the State.

“ODEQ Response Costs” shall mean all direct and indirect costs that ODEQ incurs in coordinating and consulting with EPA in conjunction with EPA’s planning and implementation of this Settlement to implement the SOW. ODEQ Response Costs are only those costs incurred to fulfill the requirements of this Settlement, including review of plans, reports, and assessments prepared pursuant to this Settlement, and scoping, planning, and negotiating this Settlement, but excluding any costs related to natural resource damages assessments, liability, or restoration. ODEQ Responses Costs are only those costs not inconsistent with the NCP, 40 C.F.R. Part 300, and are recoverable response costs pursuant

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to Sections 104 and 107 of CERCLA, 42 U.S.C. §§ 9604 and 9607. ODEQ Response Costs shall not include the costs of oversight or data gathered by ODEQ concerning any other response action or settlement agreement associated with the Site or other activities that do not specifically pertain to this Settlement.

“Owner Respondent” shall mean a Respondent ~~or Settling Public Entity~~ who owns or controls some of the Affected Property. The phrase “Owner Respondent’s Affected Property” means Affected Property owned or controlled by Owner Respondent.

“Owner Settling Public Entity” shall mean a Settling Public Entity who owns or controls some of the Affected Property. The phrase “Owner Settling Public Entity’s Affected Property” means Affected Property owned or controlled by Owner Settling Public Entity.

**Commented [MS12]:** Stephanie M.: Added def to distinguish between Owner Respondents and Owner Settling Public Entities. Also added Owner Settling Public Entities to para.19 below.

“Paragraph” or “¶” shall mean a portion of this Settlement identified by an Arabic numeral or an upper or lower case letter.

“Parties” shall mean EPA, Respondents, SFAs, and the Settling Public Entities.

“Performance Standards” or “PS” shall mean the cleanup levels and other measures of achievement of the remedial action objectives, as set forth in the ROD.

“Portland Harbor Special Account” shall mean the special account within the EPA Hazardous Substance Superfund, established for the Site by EPA pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. § 9622(b)(3), through prior settlements related to the Site.

“Portland Harbor Superfund Site” or “Site” for purposes of this Settlement shall mean the in-river portion of the site in Portland, Multnomah County, Oregon listed on the National Priorities List (NPL) on December 1, 2000 (~~45~~ 65 Fed. Reg. 75179-01) and for which a final remedy was selected in the January 2017 ~~ROD~~ Record of Decision. As described in the ~~ROD~~ Record of Decision, the Site extends in-river from approximately river mile (RM) 1.9 to 11.8 and includes certain riverbanks from the top of the bank to the river.

“RCRA” shall mean the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992 (also known as the Resource Conservation and Recovery Act).

“Record of Decision” or “ROD” shall mean the EPA Record of Decision relating to the Site, signed on January 3, 2017, by the Administrator of EPA, all attachments thereto and any subsequent ROD amendment or Explanation of Significant Differences. A copy of the ROD can be found at <https://semspub.epa.gov/work/10/100036257.pdf>.

“Remedial Action” or “RA” shall mean the remedial action selected in the ROD.

“Remedial Design” or “RD” shall mean those remedial design activities to be undertaken to develop the final plans and specifications for the RA as stated in the SOW

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depicted as the Swan Island Basin Project Area on the map attached as Appendix B and as more specifically defined by the attached SOW.

“Respondents” shall mean Daimler Trucks North America LLC and Vigor Industrial LLC and its affiliates Cascade General, Inc. and Shipyard Commerce LLC (collectively, “Vigor”).

“Section” shall mean a portion of this Settlement identified by a Roman numeral.

“Settlement” shall mean this Administrative Settlement Agreement and Order on Consent, the attached Statement of Work and all other appendices attached hereto (listed in Section XXV (Integration/Appendices)). In the event of conflict between this Settlement and any appendix, this Settlement shall control.

“Settling Federal Agencies” or “SFAs” shall mean United States Maritime Administration, United States Coast Guard, United States General Services Administration, United States Bonneville Power Administration, and the United States Department of Defense with respect to the Department of Navy and the Army Corps of Engineers, including their successor departments, agencies, or instrumentalities. The Department of Defense (DOD) shall mean the United States Department of Defense as described in 10 U.S.C. § 111 and its successor departments, agencies, or instrumentalities.

“Settling Public Entities” shall mean the State of Oregon, acting by and through the Department of State Lands, the City of Portland, and the Port of Portland.

“Statement of Work” or “SOW” shall mean the document describing the activities Respondents have agreed to perform, which is attached as Appendix A.

Commented [SIBRD GRP13]: Willamette Cove ASAO

“Supervising Contractor” shall mean the principal contractor retained by Respondents to supervise and direct the implementation of the Work under this Settlement.

“Swan Island Basin Project Area” for purposes of this Settlement shall mean the active cleanup area designated on Figure 31d of the ROD between approximately River Mile 8.1 and River Mile 9.2 on the northeast side of the Willamette River, and more specifically depicted on the map attached as Appendix B to the Settlement. The Project Area is approximately 1.1 miles in length, 117 acres in size, and includes all riverbanks from top of the bank to the river.<sup>22</sup>

“Transfer” shall mean to sell, assign, convey, lease, mortgage, or grant a security interest in, or where used as a noun, a sale, assignment, conveyance, or other disposition of any interest by operation of law or otherwise.

“Tribal Governments” shall mean the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of the Grand Ronde Community of Oregon, the Confederated Tribes of Siletz Indians, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Nez Perce Tribe. References to “Tribal Governments” in this Settlement Agreement may be a reference to an individual tribe, the tribes collectively, or some combination thereof.

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“Tribal Response Costs” shall mean all direct and indirect costs that the Tribal Governments and their employees, agents, contractors, consultants and other authorized representatives incur in coordinating and consulting with EPA in conjunction with EPA’s planning and implementation of this Settlement. Tribal Response Costs are only those costs incurred to fulfill the requirements of this Settlement, including review of plans, reports, and assessments prepared pursuant to this Settlement Agreement; but excluding any costs related to natural resource damages assessments, liability, or restoration. Tribal Response Costs are those costs that are not inconsistent with the NCP, 40 C.F.R. Part 300, and are recoverable response costs pursuant to Sections 104 and 107 of CERCLA, 42 U.S.C. §§ 9604 and 9607. Tribal Response Costs shall not include the costs of oversight or data gathered by Tribal Governments concerning any other response action or settlement agreement associated with the Site or other activities that do not specifically pertain to this Settlement.

Commented [SIBRD GRP14]: Willbridge Cove ASAO

“United States” shall mean the United States of America and each department, agency, and instrumentality of the United States, including EPA, SFAs, and any federal natural resource trustee.

“Waste Material” shall mean (1) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); (3) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any “hazardous substance” under ORS 465.200 *et seq.*

“Work” shall mean all activities and obligations Respondents have agreed will be performed under this Settlement to complete RD for design of the remedy that will be implemented within the Swan Island Basin Project Area including delineation of the SMA, implementation of area-specific pre-remedial design sampling, and application of the ROD technology decision tree in a manner that will ensure that the remedy is appropriate for actual area-specific characteristics, pursuant to the SOW as described in Appendix A and under this Settlement, except those required by Section XI (Record Retention).

Commented [SIBRD GRP15]: Adapted from B1a ASAO

#### **VI.V. FINDINGS OF FACT**

10. Based on available information and investigation, EPA has found the following, which Respondents, SFAs, and Settling Public Entities neither admit nor deny:

Commented [SIBRD GRP16]: B1a Project Area, River Mile 7 West, River Mile 9 West, and River Mile 10 West ASAOs

a. Historical industrial, commercial, agricultural, and municipal practices and releases of contaminants dating back to the early 1900s contributed to the observed chemical distribution of sediments within the Site. Historical sources responsible for the existing contamination include, but are not limited to: ship building, repair and dismantling; wood treatment and lumber milling; storage of bulk fuels and manufactured gas plant (MGP) waste; chemical manufacturing and storage; metal recycling, production and fabrication; steel mills, smelters and foundries; electrical production and distribution; municipal combined sewer overflows; and stormwater from industrial, commercial, transportation, residential and agricultural land uses. Operations that continue to exist today include: bulk fuel storage; barge building; ship repair; automobile scrapping; recycling; steel manufacturing; cement manufacturing; operation and repair of electrical transformers; and many smaller industrial

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operations, as well as other commercial, agricultural, and municipal practices.

b. On December 1, 2000, the Portland Harbor Superfund Site was listed on the National Priorities List due mainly to concerns about contamination in the sediments and the potential risks to human health and the environment from consuming fish. The most widespread contaminants found at the Site include, but are not limited to, polychlorinated biphenyls (PCBs), polycyclic aromatic hydrocarbons (PAHs), and dioxins/furans.

c. In 2001, EPA entered into a Memorandum of Understanding for the Portland Harbor Site (the MOU) with the Oregon Department of Environmental Quality (ODEQ), National Oceanic and Atmospheric Administration within the Department of Commerce, the United States Fish and Wildlife Service within the Department of the Interior, the Oregon Department of Fish and Wildlife and the Tribal Governments. The MOU, among other things, established the roles and responsibilities between EPA and ODEQ on managing the upland and in-river portions of the Site and set up a framework for technical and legal coordination among EPA and the Natural Resource Trustees; and relative to the Tribal Governments it sought to acknowledge the federal government's consultation requirements concerning the Portland Harbor Superfund Site, and to ensure the Tribal Governments' participation in the response actions at the Portland Harbor Superfund Site.

d. The Tribal Governments have treaty-reserved rights and resources and other rights, interests, or resources in the Site. The National Oceanic and Atmospheric Administration, the United States Department of the Interior, the Oregon Department of Fish & Wildlife, and the Tribal Governments are designated Natural Resource Trustees overseeing the assessment of natural resource damages at the Site. To the extent practicable, EPA intends that the Work under this Settlement will be conducted so as to be coordinated with any natural resource damage assessment and restoration of the Swan Island Basin Project Area. EPA intends to provide the Tribal Governments and the federal and state Natural Resource Trustees an opportunity to review and comment on plans, reports, and other deliverables submitted by Respondent(s) to EPA under this Settlement.

e. A Site-wide remedial investigation and feasibility study (RI/FS) was initiated in 2001 and completed in 2017. As part of the RI/FS, baseline human health and ecological risk assessments were conducted to estimate the current and future effects of contaminants in sediments, surface water, groundwater seeps, and fish tissue on human health and the environment. The risk assessments provided the basis for taking action and identified the contaminants of potential concern (COPCs) and exposure pathways that the remedial action should address.

f. The baseline human health risk assessment (BHHRA) estimated cancer risks and noncancer health hazards from exposures to a set of chemicals in sediments (both beach and in-river), surface water, groundwater seeps, and fish tissue from samples collected at the Site.

g. The baseline ecological risk assessment (BERA) estimated risks to

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aquatic and aquatic-dependent species exposed to hazardous substances associated with the in-river portion of the Site.

h. The BHHRA and BERA concluded that contamination within the Site poses unacceptable risks to human health and the environment from numerous contaminants of potential concern in surface water, groundwater, sediment, and fish tissue. The selected remedy reduced the COPCs to 64 contaminants of concern (COCs) that contribute the most significant amount of risk to the human and ecological receptors. See ROD, Appendix II, Tables 1–5.

i. A subset of the COCs, called focused COCs, was developed in order to simplify analysis and develop and evaluate remedial alternatives for the Site. The focused COCs include PCBs, PAHs, dioxins and furans, and DDx; and they contribute the most significant amount of site-wide risk to human and ecological receptors.

j. PCBs are classified as probable human carcinogens. Children exposed to PCBs may develop learning and behavioral problems later in life. PCBs are known to impact the human immune system and skin, especially in children, and may cause cancer in people. Nursing infants can be exposed to PCBs in breast milk. PCBs can also bioaccumulate in fish, shellfish, and mammals. In birds and mammals, PCBs can cause adverse effects such as anemia and injuries to the liver, stomach, and thyroid gland. PCBs also can cause problems with the immune system, behavioral problems, and impaired reproduction.

k. PAHs are human health and ecological COCs. PAHs are suspected human carcinogens with potential to cause lung, skin, and bladder cancers with occupational exposure. Animal studies show that certain PAHs affect the hematopoietic, immune, reproductive and neurologic systems and cause developmental effects. They can cause inhibited reproduction, delayed emergence, sediment avoidance, and mortality. In fish, PAHs cause liver abnormalities and impairment of the immune system.

l. Dioxins and furans are human health and ecological COCs. Toxic effects in humans include reproductive problems, problems in fetal development or early childhood, immune system damage, and cancer. Nursing infants can be exposed to dioxins and furans in breast milk. Dioxins and furans can bioaccumulate in fish, shellfish, and mammals. Animal effects include developmental and reproductive problems, hemorrhaging, and immune system problems.

m. DDx, which represents collectively DDT and its primary breakdown products dichlorodiphenyldichloroethane (DDD) and dichlorodiphenyldichloroethene (DDE), are human health and ecological COCs. DDT is considered a possible human carcinogen. DDT and DDE are stored in the body's fatty tissues. In pregnant women, DDT and DDE can be passed to the fetus. Nursing infants can be exposed to DDx in breast milk. Laboratory animal studies showed effects on the liver and reproduction. These compounds can accumulate in fish, shellfish and mammals and can cause adverse reproductive effects such as eggshell thinning in birds.

n. The ROD requires active remediation (dredging, capping, and enhanced natural recovery) at areas exceeding the remedial action levels (RALs) for the focused COCs and contaminated riverbanks adjacent to some of those areas, referred to as Sediment Management

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Areas (SMAs). The ROD provides that areas with sediment contamination below the RALs but above final cleanup levels (-approximately 1,774 acres) may- recover naturally within a reasonable timeframe while areas within Swan Island Lagoon will require enhanced natural recovery (approximately 28 acres). The ROD estimated the remedial actions at the Site would take 13 years to construct. See ROD, Appendix II, Tables 17 and 21, and Errata #2 for the Portland Harbor Superfund Site ROD Table 17 (January 14, 2020). On December 9, 2019, EPA issued an Explanation of Significant differences (ESD) to document changes to: the sediment cleanup levels (CULs), target tissue level for shellfish, and principal threat waste threshold for carcinogenic polycyclic aromatic hydrocarbons (cPAHs) measured as benzo(a)pyrene equivalents (BaP Eq); and the remedial action level (RAL) for total polycyclic aromatic hydrocarbons (PAHs). These changes were made pursuant to a toxicological update prepared under the EPA's Integrated Risk Information System (IRIS) program that resulted in a revised oral cancer slope factor.

Commented [SIBRD GRP17]: Evraz and Schnitzer Steel UAOs

o. In December 2017, EPA entered an Administrative Settlement Agreement and Order on Consent for Pre-Remedial Design Investigation and Baseline Sampling with certain parties to fulfill certain data needs identified in the ROD. In June 2019, the results of the PreRemedial Design and Baseline Sampling were presented to EPA. The data from the PreRemedial Design and Baseline Sampling, accepted for use by EPA, will be used in the development of the remedial design for the Swan Island Basin Project Area.

Commented [SIBRD GRP18]: River Mile 7 West ASAO

p. Respondent Daimler Trucks North America LLC (Daimler) (formerly Freightliner Corporation) is primarily engaged in the manufacture and assembly of heavy-duty trucks in North America. Respondent Daimler currently owns and operates properties near and adjacent to the Swan Island Basin Project Area from which there may have been documented releases of certain COCs to the Swan Island Basin portion of the Willamette River, including two industrial heavy-duty truck assembly facilities, a wind tunnel facility, and a number of commercial building properties. Daimler also formerly owned and operated properties within the Swan Island Basin Project Area at the time of disposal of hazardous substances at the Site. Although numerous other potentially responsible parties own or operate, or have owned or operated, facilities at or near the Swan Island Basin Project Area, from which hazardous substances have been allegedly released, Respondent Daimler has agreed to step forward to jointly perform the Work with the other Respondent and in cooperation with the SFAs and Settling Public Entities.

Commented [MS19]: Stephanie M.: This language is from the RM 10W ASAO.

q. Respondents Vigor Industrial LLC and Cascade General, Inc. are operators at the Portland Shipyard, which is owned by Respondent Shipyard Commerce LLC is owner of the Portland Shipyard, a wholly owned subsidiary of Vigor Industrial LLC. The Portland Shipyard is located on the northern tip of the Swan Island peninsula, parts of which are within the Swan Island Basin Project Area. There have been documented releases of certain COCs from the Portland Shipyard into the Willamette River and the Swan Island Basin.

r. Settling Public Entity, State of Oregon, by and through the Department of State Lands currently manages, or has managed, certain submerged and submersible lands held in trust by the State of Oregon within the Portland Harbor Superfund Site from which and to which releases of hazardous substances have occurred.

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s. Settling Public Entity, City of Portland, currently owns property within the Portland Harbor Superfund Site, including City stormdrains and outfalls within the Swan Island Project Area from which releases of hazardous substances have occurred.

t. Settling Public Entity, Port of Portland, currently owns property within the Portland Harbor Superfund Site, including Swan Island Project Area from which releases of hazardous substances have occurred. The Port of Portland also formerly owned and managed property within the Swan Island Project Area at the time of disposal of hazardous substances at the Site.

u. The Maritime Administration and its predecessor agencies leased property within the Swan Island Basin Project Areas for construction and operation of a shipyard and contracted for the repair and maintenance of Maritime Administration-owned ships within the Portland Harbor Superfund Site, including the Swan Island Basin Project Area, at the time of disposal of a hazardous substance at the Site.

v. The United States Coast Guard currently owns or operates its Marine Safety Office on property near the Swan Island Basin Project Area within the Portland Harbor Superfund Site, and has owned and operated that property at the time of disposal of a hazardous substance at the Site, including within the Swan Island Basin Project Area. Current and past operations at that property include administrative and training activities and the docking and maintenance of watercraft.

w. The United States General Services Administration, through its predecessor agencies, leased and then subleased the shipyard within the Swan Island Basin Project Area for several years and owned other properties within the Site at the time of disposal of a hazardous substance at the Site.

x. The United States, Department of Energy, Bonneville Power Administration, owns one property from which releases of hazardous substances has occurred, and historically owned or operated Pennwalt substation, within the Portland Harbor Superfund Site at the time of disposal of a hazardous substance at the Site.

y. The DOD, through its Department of the Navy, currently owns or operates a naval reserve facility at the Portland Harbor Superfund Site near the Swan Island Basin Project Area. Current and past operations at the property include administrative and training activities, as well as some motor vehicle and small boat maintenance. Additionally, the DOD through its Department of the Navy owned a dry dock within the Swan Island Basin Project Area and contracted for the repair and maintenance of Navy-owned ships within the Site, including the Swan Island Basin Project Area, at the time of disposal of a hazardous substance at the Site.

z. The DOD, through the Army Corps of Engineers . . .  
Settling Federal Agencies, \_

**Commented [MS20]:** Stephanie M.: DOJ to provide language later this week.

## ~~VII~~.VI. CONCLUSIONS OF LAW AND DETERMINATIONS

11. Based on the Findings of Fact set forth above and the administrative record, EPA makes the following conclusions of law and determinations, which Respondents, SFAs, and Settling Public Entities neither admit nor deny:

a. The Portland Harbor Superfund Site is a “facility” as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

b. The contamination found at the Site, as identified in the Findings of Fact above, includes “hazardous substances” as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

c. Each Respondent, SFA, and Settling Public Entity is a “person” as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

d. Each Respondent, SFA, and Settling Public Entity is alleged by EPA to be a responsible party under Section 107(a)(1) or Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(1) or (2).

e. The conditions described in the Findings of Fact above constitute an actual or threatened “release” of a hazardous substance from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

f. The RD required by this Settlement as defined in the SOW is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Settlement, will be consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

## ~~VIII~~.VII. SETTLEMENT AGREEMENT AND ORDER

12. Based upon EPA’s Findings of Fact, Conclusions of Law, and Determinations set forth above, and the administrative record for the Site, it is hereby Ordered and Agreed that Respondents shall comply with all provisions of this Settlement, including, but not limited to, all appendices to this Settlement and any amendments or modifications to this Settlement. Settling Public Entities agree to comply with the provisions of this Settlement that establish requirements for the Settling Public Entities. The United States on behalf of the SFAs agrees to comply with those provisions that establish requirements for SFAs.

## ~~IX~~.VIII. PERFORMANCE OF THE WORK

### 13. Coordination and Supervision

#### a. Project Coordinators.

(1) Respondents’ Project Coordinator must have sufficient technical expertise to coordinate the Work. Respondents’ Project Coordinator may not be an attorney representing any Respondent in this matter and may not act as the

**Commented [SIBRD GRP21]:** B1a Project Area, River Mile 7 West, River Mile 9 West, and River Mile 10 West ASAOs

**Commented [SIBRD GRP22]:** Willamette Cove ASAO

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Supervising Contractor. Respondents' Project Coordinator may assign other representatives, including other contractors, to assist in coordinating the Work.

(2) EPA's designated Project Coordinator is \_\_\_\_\_, [a](#) Remedial Project Manager in Region 10's Superfund and Emergency Management Division. EPA may designate other representatives, which may include its employees, contractors and/or consultants, to oversee the Work. EPA may arrange for ODEQ to takeover lead oversight role under this Settlement Agreement, subject to Respondent's agreement. EPA's Project Coordinator will have the same authority as a remedial project manager and/or an on-scene coordinator, as described in the NCP. This includes the authority to halt the Work and/or to conduct or direct any necessary response action when he or she determines that conditions at the Site constitute an emergency or may present an immediate threat to public health or welfare or the environment due to a release or threatened release of Waste Material.

(3) Respondents' Project Coordinator shall meet monthly with EPA's Project Coordinator in person, by telephone, or other electronic means, unless Respondents' Project Coordinator and EPA's Project Coordinator agree upon a different schedule.

b. **Supervising Contractor.** Respondents' proposed Supervising Contractor must have sufficient technical expertise to supervise the Work and a quality assurance system that complies with ASQ/ANSI E4:2014, "Quality management systems for environmental information and technology programs - Requirements with guidance for use" (American Society for Quality, February 2014).

c. **Procedures for Disapproval/Notice to Proceed**

(1) Respondents shall designate, and notify EPA, within 10 days after the Effective Date, of the name(s), title(s), contact information, and qualifications of Respondents' proposed Project Coordinator and Supervising Contractor, whose qualifications shall be subject to EPA's review for verification based on objective assessment criteria (*e.g.*, experience, capacity, technical expertise) and do not have a conflict of interest with respect to the project.

(2) EPA shall issue notices of disapproval and/or authorizations to proceed regarding the proposed Project Coordinator and Supervising Contractor, as applicable. If EPA issues a notice of disapproval, Respondents shall, within 30 days, submit to EPA a list of supplemental proposed Project Coordinators and/or Supervising Contractors, as applicable, including a description of the qualifications of each. EPA shall issue a notice of disapproval or authorization to proceed regarding each supplemental proposed coordinator and/or contractor. Respondents may select any coordinator/contractor covered by an authorization to proceed and shall, within 21 days, notify EPA of Respondents' selection.

(3) Respondents may change their Project Coordinator and/or Supervising Contractor, as applicable, by following the procedures of ¶¶ 14.c(1) and 14.c(2).

14. **Performance of Work in Accordance with SOW.** Respondents shall develop the RD in accordance with the SOW and all EPA-approved, conditionally-approved, or modified deliverables as required by the SOW. All deliverables required to be submitted for approval under the Settlement or SOW shall be subject to approval by EPA in accordance with ¶ 5.5 (Approval of Deliverables) of the SOW.

15. **Relationship to other work at the Portland Harbor Superfund Site..** While all approved data, including baseline data will be considered, all final decisions regarding RD at the Project Area, including delineation of SMAs, implementation of any sampling necessary for design, and application of the ROD's technology matrix, will be made under this Settlement and this SOW.

16. **Emergencies and Releases.** Respondents shall comply with the emergency and release response and reporting requirements required in ¶ 3.12 of the SOW. Subject to Section XVII (Covenants by EPA), nothing in this Settlement, including ¶ 3.12 of the SOW, limits any authority of EPA to perform the following: (a) to take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Swan Island Basin Project Area, or (b) to direct or order such action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Swan Island Basin Project Area. If, due to Respondents' failure to take appropriate response action under ¶ 3.12 of the SOW, EPA takes such action instead, Respondents shall reimburse EPA under Section XIII (Payment of Response Costs) for all costs of the response action.

17. **Community Involvement.** If requested by EPA, Respondents shall conduct community involvement activities regarding the Work under EPA's oversight as provided for in, and in accordance with, Section 2 (Community Involvement) of the SOW. Such activities may include, but are not limited to, designation of a Community Involvement Coordinator. Costs incurred by EPA under this Section constitute EPA Future Response Costs to be reimbursed under Section XIII (Payment for Response Costs).

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18. **Modification of SOW or Related Deliverables**

a. If EPA determines that it is necessary to modify the work specified in the SOW and/or in deliverables developed under the SOW in order to carry out the RD, then EPA may notify Respondents of such modification. Any oral modification will be memorialized by EPA promptly, but shall have as its effective date the date of EPA's Project Coordinator's oral direction. Any such modification must be in accordance with Section III (Statement of Purpose), provided that EPA retains its authority under ¶ 17 (Emergencies and Releases). If Respondents object to the modification they may, within 30 days after EPA's notification, seek dispute resolution under Section XIV (Dispute Resolution).

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b. The SOW and/or related work plans shall be modified, as follows: (1) in accordance with the modification issued by EPA; or (2) if Respondents invoke dispute resolution, in accordance with the final resolution of the dispute. The modification shall be incorporated into and enforceable under this Settlement, and Respondents shall implement all work required by such modification. Respondents shall incorporate the modification into the deliverable required under the SOW, as appropriate.

c. Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions as otherwise provided in this Settlement and to the extent consistent with Section III (Statement of Purpose) and the Work.

**Commented [SIBRD GRP25]:** Similar language found in B1a ASAO and Willamette Cove ASAO

### **X.IX. PROPERTY REQUIREMENTS**

19. **Agreements Regarding Access and Non-Interference.** Respondents shall, with respect to any Non-Settling Owner's Affected Property, use best efforts to secure from such Non-Settling Owner an agreement, enforceable by Respondents and the EPA, providing that such Non-Settling Owner, ~~and~~ Owner Respondent or Owner Settling Public Entity shall, with respect to the Affected Property: (i) provide EPA, DEQ, the Respondents, and their representatives, contractors, and subcontractors with access at all reasonable times to such Affected Property to conduct any activity regarding the Settlement, including those activities listed in ¶ 20.a (Access Requirements); and (ii) refrain from using such Affected Property in any manner that EPA determines will pose an unacceptable risk to human health or to the environment due to exposure to Waste Material, or that interferes with or adversely affects the implementation or integrity of the Work under this Settlement. Respondents shall provide a copy of such access and use restriction agreement(s) to EPA.

a. **Access Requirements.** The following is a list of activities for which access is required regarding the Affected Property:

- (1) Monitoring the Work;
- (2) Verifying any data or information submitted to the United States;
- (3) Conducting investigations regarding contamination at or near the Swan Island Basin Project Area;
- (4) Obtaining samples;
- (5) Assessing the need for, planning, implementing, or monitoring response actions;
- (6) Assessing implementation of data management and institutional controls defined in the approved data management work plan and ICIAP as provided in the SOW;
- (7) Implementing the Work pursuant to the conditions set forth in ¶ 72 (Work Takeover);

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(8) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Respondents or their agents, consistent with Section X (Access to Information);

(9) Assessing Respondents' compliance with the Settlement;

(10) Determining whether the Affected Property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted under the Settlement; and

(11) Implementing, monitoring, maintaining, reporting on, and enforcing any land, water, or other resource use restrictions regarding the Affected Property needed to accomplish the Work.

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20. **Best Efforts.** As used in this Section, "best efforts" means the efforts that a reasonable person in the position of Respondents would use so as to achieve the goal in a timely manner, including the cost of employing professional assistance and the payment of reasonable sums of money to secure access, as required by this Section. If Respondents are unable to accomplish what is required through "best efforts" in a timely manner, they shall notify EPA, and include a description of the steps taken to comply with the requirements. If EPA deems it appropriate, it may assist Respondents, or take independent action, in obtaining such access. All costs incurred by EPA the United States Department of Justice in providing such assistance or taking such action, including the cost of attorney time and the amount of monetary consideration or just compensation paid, constitute EPA Future Response Costs to be reimbursed under Section XIII (Payment of Response Costs).

21. If EPA determines in a decision document prepared in accordance with the NCP that institutional controls in the form of state or local laws, regulations, ordinances, zoning restrictions, or other governmental controls or notices are needed, Respondents shall cooperate with EPA's efforts to secure and ensure compliance with such institutional controls.

22. In the event of any Transfer of the Affected Property, unless EPA otherwise consents in writing, Respondents shall continue to comply with its obligations under the Settlement, including their obligation to secure access.

23. **Notice to Successors-in-Title.** Prior to entering into a contract to Transfer its Affected Property, or 60 days prior to Transferring its Affected Property, whichever is earlier, Owner Respondent or Owner Settling Public Entity shall do the following: (a) Notify the proposed transferee that EPA has determined that an RD must be performed at the Swan Island Basin Project Area, that potentially responsible parties have entered into an Administrative Settlement Agreement and Order on Consent requiring implementation of such RD, (identifying the name, docket number, and the effective date of this Settlement); and (b) Notify EPA of the name and address of the proposed transferee and provide EPA with a copy of the above notice that it provided to the proposed transferee. The Department of State Lands may satisfy the requirements of ¶ 24(a) and (b) by providing transferee with notice in or with a DSL-issued use authorization that constitutes a "Transfer" under this provision and by providing EPA both the name and address of the transferee and a copy of the above notice.

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24. Notwithstanding any provision of the Settlement, EPA retains all of its access authorities and rights, as well as all of its rights to require land, water, or other resource use restrictions, including enforcement authorities related thereto under CERCLA, RCRA, and any other applicable statute or regulations.

#### **XLX. ACCESS TO INFORMATION**

25. Respondents shall provide to EPA, upon request, copies of all records, reports, documents and other information (including records, reports, documents and other information in electronic form) (hereinafter referred to as “Records”) within their possession or control or that of its contractors or agents relating to activities at the Swan Island Basin Project Area or to the implementation of this Settlement, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondents shall also make available to EPA, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work. Respondents will provide to the U.S. Department of Justice on behalf of the SFAs, upon request, any documents described in this paragraph.

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#### **26. Privileged and Protected Claims**

a. Respondents may assert all or part of a Record requested by EPA is privileged or protected as provided under federal law, in lieu of providing the Record, provided Respondents comply with ¶ 27.b, and except as provided in ¶ 27.c.

b. If Respondents assert such a privilege or protection, they shall provide EPA with the following information regarding such Record: its title; its date; the name, title, affiliation (e.g., company or firm), and address of the author, of each addressee, and of each recipient; a description of the Record’s contents; and the privilege or protection asserted. If a claim of privilege or protection applies only to a portion of a Record, Respondents shall provide the Record to EPA in redacted form to mask the privileged or protected portion only. Respondents shall retain all Records that it claims to be privileged or protected until EPA has had a reasonable opportunity to dispute the privilege or protection claim and any such dispute has been resolved in Respondents’ favor.

c. Respondents may make no claim of privilege or protection for the following information: (1) any data regarding the Swan Island Basin Project Area collected in performing the Work under this Settlement, including, but not limited to, all sampling, analytical, monitoring, hydrogeological, scientific, chemical, radiological, or engineering data, or the portion of any other Record that evidences conditions at or around the Swan Island Basin Project Area; or (2) the portion of any Record that Respondents are required to create or generate pursuant to this Settlement.

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27. **Business Confidential Claims.** Respondents may assert that all or part of a Record provided to EPA under this Section or Section XI (Record Retention) is business confidential to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Respondents shall segregate and clearly

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identify all Records or parts thereof submitted under this Settlement for which Respondents assert business confidentiality claims. Records claimed as confidential business information will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies Records when they are submitted to EPA, or if EPA has notified Respondent(s) that the Records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such Records without further notice to Respondents.

28. Notwithstanding any provision of this Settlement, EPA retains all of its information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

#### **XII.XI. RECORD RETENTION**

29. Until 10 years after completion of the Remedial Action, Respondents shall preserve and retain all non-identical copies of Records (including Records in electronic form) now in their possession or control or that come into their possession or control that relate in any manner to its liability under CERCLA with respect to the Site, provided, however, that a Respondent who is potentially liable as owners or operators of the Site must retain, in addition, all Records that relate to the liability of any other person under CERCLA with respect to the Site. Each Respondent must also retain, and instruct its contractors and agents to preserve, for the same period of time specified above, all non-identical copies of the last draft or final version of any Records (including Records in electronic form) now in their possession or control or that come into their possession or control that relate in any manner to the performance of the Work, provided, however, that each Respondent (and its contractors and agents) must retain, in addition, copies of all data generated during the performance of the Work and not contained in the aforementioned Records required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.

30. At the conclusion of the document retention period, Respondents shall notify EPA at least 90 days prior to the destruction of any such Records and, upon request by EPA, and except as provided for in ¶ 27 (Privileged and Protected Claims), Respondents shall deliver any such Records to EPA.

31. Respondents and Settling Public Entities certify that to the best of their knowledge and belief, after thorough inquiry, they have not altered, mutilated, discarded, destroyed, or otherwise disposed of any Records (other than identical copies) relating to ~~its~~their potential liability regarding the Site since notification of potential liability by EPA. Save for Cascade General, Inc.'s and Shipyard Commerce Center LLC's obligation to update their CERCLA Section 104(e) response within six months of the Effective Date, Respondents and Settling Public Entities further certify that to the best of their knowledge and belief, after thorough inquiry, -and that- they have fully complied with any and all EPA requests for information regarding the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927, and state law.

32. The United States on behalf of the SFAs acknowledges that each SFA: (1) is subject to all applicable federal record retention laws, regulations and policies; and (2) has

certified that it has fully complied with those record retention policies and any and all EPA requests for information regarding the Site pursuant to Section 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927, and applicable state law.

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### ~~XIII~~.XII. COMPLIANCE WITH OTHER LAWS

33. Nothing in this Settlement limits Respondents' obligations to comply with the requirements of all applicable federal and state laws and regulations. Respondents must also comply with all applicable or relevant and appropriate requirements of all federal and state environmental laws as set forth in the ROD and the SOW. The activities conducted pursuant to this Settlement, if approved by EPA, shall be considered consistent with the NCP.

34. **Permits.** As provided in Section 121(e) of CERCLA, 42 U.S.C. § 9621(e), and Section 300.400(c)(3) of the NCP, no permit shall be required for any portion of the Work conducted entirely on-site (*i.e.* within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work). Where any portion of the Work that is not on-site requires a federal, state, or local permit or approval, Respondents shall submit timely and complete applications and take all other actions necessary to obtain and to comply with all such permits or approvals.

35. Respondents may seek relief under the provisions of Section XV (Force Majeure) for any delay in performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit or approval referenced in ¶ 35 (Permits) and required for the Work, provided that it has submitted timely and complete applications and taken all other actions necessary to obtain all such permits or approvals. This Settlement is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

### ~~XIV~~.XIII. PAYMENT OF RESPONSE COSTS

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#### 36. **Payments by the United States on behalf of the SFAs.**

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a. **Payment to Respondents.** As soon as reasonably practicable after the Effective Date and after receipt of accurate payment instructions provided by Respondents, the United States, on behalf of the SFAs, shall deposit \$12,000,000.00 into the Account, in full settlement of contribution claims for the Work, EPA Future Response Costs, ODEQ Response Costs, and Tribal Response Costs. The payment shall be by Automated Clearing House (ACH) Electronic Funds Transfer in accordance with instructions provided by Respondents.

b. **Effect of Payment.** The payment by the United States on behalf of the SFAs under this Settlement is intended to completely resolve any liability of the Settling Federal Agencies with regard to the Work described in Appendix A. The respective amounts of response costs paid by Respondents, SFAs, and the Settling Public Entities under this Settlement are without prejudice to any issue of liability of the Respondents, SFAs, and the Settling Public Entities for any further response action(s) at or within the Portland Harbor Superfund Site or the Swan Island Basin Project Area, or to the equitable allocation of any costs among the Parties (and other parties) in a future agreement or proceeding relating to work other than that described in Appendix A of this Settlement.

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c. The Parties to this Settlement recognize and acknowledge that the payment obligations of the United States by and on behalf of the SFAs under this Settlement can only be paid from appropriated funds legally available for such purpose. Nothing in this Settlement shall be interpreted or construed as a commitment or requirement that the United States or any SFA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.

d. **Interest.** In the event that the payment required by ¶ 37.a is not made within 120 days after the Effective Date and receipt of accurate payment instructions provided by Respondents, the United States by or on behalf of the SFAs shall pay Interest on the unpaid balance at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), with such Interest commencing on the 121st day and continuing through the date of the payment.

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**37. Payments by the Port of Portland.**

a. **Payment to Respondents.** The Port of Portland (Port) shall pay a total of \$12,000,000.00 into the Account established by the Respondents as follows:

(1) Payment 1: The Port shall deposit [x% of its total payment] within 30 days of the Effective Date or receipt of accurate payment instructions provided by Respondents, whichever is later; and

(2) Payment 2: The Port shall deposit [x% of its total payment] into the Account [as needed to sync initial payments]

b. The payments shall be by Automated Clearing House (ACH) Electronic Funds Transfer in accordance with instructions provided by Respondents.

**38. Payments by the City of Portland.**

a. The City of Portland (City) shall pay a total of \$3,600,000.00 into the Account established by the Respondents as follows:

(1) Payment 1: The City shall deposit [x% of its total payment] within 30 days of the Effective Date or receipt of accurate payment instructions provided by Respondents, whichever is later; and

(2) Payment 2: The City shall deposit [x% of its total payment] into the Account [as needed to sync initial payments]

b. The payments shall be by Automated Clearing House (ACH) Electronic Funds Transfer in accordance with instructions provided by Respondents.

**39. Payments by the State of Oregon.**

a. **Payment to Respondents.** The State of Oregon, by and through its Department of State Lands (State) shall pay a total of \$3,600,000.00 into the Account established by the Respondents as follows:

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(1) Payment 1: The State shall deposit [50% of its total payment] within 30 days of the Effective Date or receipt of accurate payment instructions provided by Respondents, whichever is later; and

(2) Payment 2: The State shall deposit [50% of its total payment] into the Account [as needed to sync initial payments]

40. **Payments by Respondents for EPA Future Response Costs.** Respondents shall pay to EPA all EPA Future Response Costs not inconsistent with the NCP and incurred in accordance with Section III (Statement of Purpose).

a. **Periodic Bills.** On a semi-annual basis, EPA will send Respondents a bill or bills requiring payment of EPA Future Response Costs that includes a SCORPIOS Report or similar EPA-prepared cost summary report, which includes direct and indirect costs incurred by EPA, its contractors, its subcontractors, and the United States Department of Justice. Respondents shall make all payments within 30 days after Respondents' receipt of each bill requiring payment, except as otherwise provided in ¶ 43 (Contesting EPA Future Response Costs).

b. **Payments.** Payments made pursuant to this Paragraph 42 shall be made by EFT in accordance with EFT instructions provided by EPA, or by submitting a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party making the payment, the Site name, the EPA Region, the account number 10SW for the Swan Island Project Area, or 10TC for a bill that covers an equalhe-corresponding portion of the Site-wide RD costs, and the EPA docket number for this action. Respondents shall send the check to:

U.S. Environmental Protection Agency  
Superfund Payments  
Cincinnati Finance Center  
P.O. Box 979076  
St. Louis, MO 63197-9000

Respondents shall use the following address for payments made by overnight mail:

U.S. Bank  
1005 Convention Plaza  
Mail Station SL-MO-C2GL  
St. Louis, MO 63101-1229

c. **Notice.** At the time of payment, Respondents shall send notice that payment has been made to EPA to the Region 10 Project Coordinator and to the Servicing Finance Office, EPA Finance Center, MS-NWD, Cincinnati, OH 45268.

d. **Deposit of EPA Future Response Costs Payments.** The total amount to be paid by Respondents pursuant to ¶41.a (Periodic Bills) shall be deposited by EPA in the Portland Harbor Special Account to be retained and used to conduct or finance response actions

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at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund; provided, however, that EPA may deposit a EPA Future Response Costs payment directly into the EPA Hazardous Substance Superfund if, at the time the payment is received, EPA estimates that the Portland Harbor Special Account balance is sufficient to address currently anticipated future response actions to be conducted or financed by EPA at or in connection with the Site. Any decision by EPA to deposit an EPA Future Response Costs payment directly into the EPA Hazardous Substance Superfund for this reason shall not be subject to challenge by Respondents pursuant to the dispute resolution provisions of this Settlement or in any other forum.

41. **Interest.** In the event that any payment for EPA Future Response Costs is not made by the date required, Respondents shall pay Interest on the unpaid balance. The Interest on EPA Future Response Costs shall begin to accrue on the date of the bill. The Interest shall accrue through the date of Respondent's payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the EPA by virtue of Respondent's failure to make timely payments under this Section, including but not limited to, payment of stipulated penalties pursuant to Section XVI (Stipulated Penalties).

42. **Contesting EPA Future Response Costs.** Respondents may initiate the procedures of Section XIV (Dispute Resolution) regarding payment of any EPA Future Response Costs billed under ¶ 41 (Payments by Respondents for EPA Future Response Costs) if they determine that EPA has made a mathematical error or included a cost item that is not within the definition of EPA Future Response Costs, or if it believes EPA incurred excess costs as a direct result of an EPA action that was inconsistent with a specific provision or provisions of the NCP. To initiate such dispute, Respondents shall submit a Notice of Dispute in writing to the EPA Project Coordinator within 30 days after receipt of the bill. Any such Notice of Dispute shall specifically identify the contested EPA Future Response Costs and the basis for objection. If Respondents submit a Notice of Dispute, Respondents shall within the 30-day period, also as a requirement for initiating the dispute, (a) pay all uncontested EPA Future Response Costs to EPA in the manner described in ¶ 41, and (b) establish, in a duly chartered bank or trust company, an interest-bearing escrow account that is insured by the Federal Deposit Insurance Corporation (FDIC) and remit to that escrow account funds equivalent to the amount of the contested EPA Future Response Costs. Respondents shall send to the EPA Project Coordinator a copy of the transmittal letter and check paying the uncontested EPA Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. If EPA prevails in the dispute, within 5 days after the resolution of the dispute, Respondents shall pay the sums due (with accrued interest) to EPA in the manner described in ¶ 41. If Respondents prevails concerning any aspect of the contested costs, Respondents shall pay that portion of the costs (plus associated accrued interest) for which they did not prevail to EPA in the manner described in ¶ 41. Respondents shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XIV (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Respondents' obligation to reimburse EPA for EPA Future Response Costs.

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43. **Payment of ODEQ Response Costs**

a. Respondents shall be responsible under this Settlement for reimbursing ODEQ Response Costs incurred pursuant to this Settlement that are not inconsistent with the NCP under the terms of a separate agreement to be executed by Respondents and ODEQ (“ODEQ Agreement”).

b. Disputes regarding ODEQ Response Cost bills shall be resolved in accordance with a process agreed to between ODEQ and Respondents under the ODEQ Agreement, and neither ruled by nor conducted under the dispute resolution provisions of this Settlement.

c. Nothing in this Paragraph shall be construed to limit ODEQ’s authority under any source other than this Settlement to seek funding from Respondents or any other party of any costs that ODEQ may incur or may have incurred.

44. **Payment of Tribal Response Costs**

a. Respondents shall be responsible for funding Tribal Response Costs incurred pursuant to this Settlement that are not inconsistent with the NCP and as agreed to by the Tribal Governments and Respondents under one or more separate agreements.

b. Disputes regarding Tribal Response Cost bills shall be resolved in accordance with a process agreed to between the Tribal Governments and Respondents under one or more separate agreements entered into between Respondents and the Tribal Governments, and neither ruled by nor conducted under the dispute resolution provisions of this Settlement.

c. Nothing in this section shall in any way be construed to limit the rights of the Tribal Governments to seek to recover response costs incurred by the Tribal Governments related to this Settlement and disputed by Respondents, or for natural resource damages as defined by 42 U.S.C. § 9607(a)(4)(C).

**XV.XIV. DISPUTE RESOLUTION**

45. Unless otherwise expressly provided for in this Settlement, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Settlement. The Parties shall attempt to resolve any disagreements concerning this Settlement expeditiously and informally.

46. **Informal Dispute Resolution.** If Respondents object to any EPA action taken pursuant to this Settlement, including billings for EPA Future Response Costs, they shall send EPA a written Notice of Dispute describing the objection(s) within 20 days after such action, unless the objection(s) has/have been resolved informally. EPA and Respondents shall have 30 days from EPA’s receipt of Respondent’s Notice of Dispute to resolve the dispute through informal negotiations (the Negotiation Period). The Negotiation Period may be extended at the sole discretion of EPA. Any agreement reached by the Parties pursuant to this Section shall be in writing and shall, upon signature by the Parties, be incorporated into and become an enforceable part of this Settlement.

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47. **Formal Dispute Resolution.** If the Parties are unable to reach an agreement within the Negotiation Period, Respondents shall, within 20 days after the end of the Negotiation Period, submit a statement of position to EPA. At or about the time Respondents submit their statement of position initiating formal dispute resolution, Respondents may meet with the Regional Administrator, EPA Region 10 or, if the Regional Administrator is not available, the Deputy Regional Administrator. EPA may, within 20 days thereafter, submit a statement of position. The Respondent may request that technical experts, such as the Contaminated Sediments Technical Advisory Group (“CSTAG”), assist in resolving the dispute. A decision that CSTAG participation is needed is a decision that the Regional Administrator, EPA Region 10, will make. The Regional Administrator or Deputy Regional Administrator will issue a written decision on the dispute to Respondents. EPA’s decision shall be incorporated into and become an enforceable part of this Settlement. Following resolution of the dispute, as provided by this Section, Respondents shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA’s decision, whichever occurs.

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48. The invocation of formal dispute resolution procedures under this Section does not extend, postpone, or affect in any way any obligation of Respondents under this Settlement, except as provided by ¶ 43 (Contesting EPA Future Response Costs), as agreed by EPA.

49. Except as provided in ¶ 59, stipulated penalties with respect to the disputed matter shall continue to accrue, but payment shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Settlement. In the event that Respondents do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XVI (Stipulated Penalties).

#### **XVI-XV. FORCE MAJEURE**

50. “Force Majeure” for purposes of this Settlement is defined as any event arising from causes beyond the control of Respondents, of any entity controlled by Respondents, or of Respondents’ contractors that delays or prevents the performance of any obligation under this Settlement despite Respondents’ best efforts to fulfill the obligation. The requirement that Respondents exercise “best efforts to fulfill the obligation” includes using best efforts to anticipate any potential force majeure and best efforts to address the effects of any potential force majeure (a) as it is occurring and (b) following the potential force majeure such that the delay and any adverse effects of the delay are minimized to the greatest extent possible. “Force majeure” does not include financial inability to complete the Work or increased cost of performance.

51. If any event occurs or has occurred that may delay the performance of any obligation under this Settlement for which Respondents intend or may intend to assert a claim of force majeure, Respondents shall notify the EPA Project Coordinator orally or, in his or her absence, EPA’s Alternate Project Coordinator or, in the event both of EPA’s designated representatives are unavailable, the Director of the Superfund and Emergency Management Division, EPA Region 10, within 24 hours of when Respondents first knew that the event might cause a delay. Within 10 days thereafter, Respondents shall provide in writing to EPA an explanation and description of the reasons for the delay; the anticipated duration of the delay; all

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actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondents' rationale for attributing such delay to a force majeure; and a statement as to whether, in the opinion of Respondents, such event may cause or contribute to an endangerment to public health or welfare, or the environment. Respondents shall include with any notice all available documentation supporting its claim that the delay was attributable to a force majeure. Respondents shall be deemed to know of any circumstance of which Respondents, any entity controlled by Respondents, or Respondents' contractors knew or should have known. Failure to comply with the above requirements regarding an event shall preclude Respondents from asserting any claim of force majeure regarding that event; provided, however, that if EPA, despite the late or incomplete notice, is able to assess to its satisfaction whether the event is a force majeure under ¶ 51 and whether Respondents have exercised their best efforts under ¶ 51, EPA may, in its unreviewable discretion, excuse in writing Respondents' failure to submit timely or complete notices under this Paragraph.

52. If EPA agrees that the delay or anticipated delay is attributable to a force majeure, the time for performance of the obligations under this Settlement that are affected by the force majeure will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure, EPA will notify Respondents in writing of its decision. If EPA agrees that the delay is attributable to a force majeure, EPA will notify Respondents in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure.

53. If Respondents elect to invoke the dispute resolution procedures set forth in Section XIV (Dispute Resolution), they shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Respondents shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Respondents complied with the requirements of ¶¶ 51 and 52. If Respondents carry this burden, the delay at issue shall be deemed not to be a violation by Respondents of the affected obligation of this Settlement identified to EPA.

54. The failure by EPA to timely complete any obligation under the Settlement is not a violation of the Settlement, provided, however, that if such failure prevents Respondents from meeting one or more deadlines under the Settlement, Respondent(s) may seek relief under this Section.

#### **XVII.XVI. STIPULATED PENALTIES**

##### **55. Stipulated Penalties.**

**a.** Respondents and Settling Public Entities shall be liable to EPA for stipulated penalties in the amounts set forth in ¶¶ 57.a and 58 for failure to comply with the obligations specified in ¶¶ 57.b.a. and 58, as relevant, unless excused under Section XV (Force

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Majeure). “Comply” as used in the previous sentence includes compliance by Respondents and Settling Public Entities with all applicable requirements of this Settlement, within the deadlines established under this Settlement. If Respondents initially submitted or resubmitted a deliverable that contains a material defect and the conditions are met for modifying the deliverable under ¶ 5.5(a)(2) of the SOW, or if Respondents resubmitted a deliverable that contains a material defect; then the material defect constitutes a lack of compliance for purposes of this Paragraph.

a.b. Settling Public Entities shall be liable to EPA for stipulated penalties in the amounts set forth in ¶ 57.a for failure to comply with the obligations specified in ¶ 57.b(1), unless excused under Section XV (Force Majeure).

**55.56. Stipulated Penalty Amounts: Payments, Financial Assurance, Major Deliverables, and Other Milestones.**

a. The following stipulated penalties shall accrue per violation per day for any noncompliance with any obligation identified in ¶ 57.b:

Penalty Per Violation Per Day	Period of Noncompliance
\$ 500	1st through 7th day
\$ 1,000	8th through 14th day
\$ 2,500	15th through 30th day
\$ 5,000	31st day and beyond

**b. Obligations**

(1) Payment of an amount due to the Account under Section XIII (Payment of Response Costs).

(2) Payment of any amount due of EPA Future Response Costs under ¶ 42 (Payments by Respondents for EPA Future Response Costs).

(3) Establishment and maintenance of a financial assurance requirement, in accordance with Section XXIV(Financial Assurance).

(4) Establishment of an escrow account to hold any disputed EPA Future Response Costs under ¶ 43 (Contesting EPA Future Response Costs).

(5) Submission of timely and quality deliverables for tasks 1a, 1b, 2a, 2b, 3a, 3b, 4a, 4b, 5a, 5b, 6a, 6b, 7a, 7b, 8a, 8b, 9a, 9b, 10, 11, 12, and 13, ~~and 14~~ listed under ¶ 6.2 of the SOW.

**56.57. Stipulated Penalty Amounts: Other Deliverables.** The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate deliverables required by this Settlement, other than those specified in ¶ 57~~8~~.b:

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Penalty Per Violation Per Day	Period of Noncompliance
\$ 250	1st through 7th day
\$ 500	8th through 14th day
\$ 1,000	15th through 30th day
\$ 2,500	31st day and beyond

57.58. In the event that EPA assumes performance of a portion or all of the Work pursuant to ¶ 732 (Work Takeover), Respondents shall be liable for a stipulated penalty in the amount of \$75,000 or 25% of the cost of the Work EPA performs, whichever is less. Stipulated penalties under this Paragraph are in addition to the remedies available to EPA under ¶¶ 732 (Work Takeover) and 97 (Access to Financial Assurance).

58.59. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. Penalties shall continue to accrue during any dispute resolution period and shall be paid within 15 days after the agreement or the receipt of EPA's decision if EPA prevails in such dispute. However, stipulated penalties shall not accrue, as follows: (a) with respect to a deficient submission under ¶ 5.5 (Approval of Deliverables) of the SOW, during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Respondents of any deficiency; and (b) with respect to a decision by the Regional Administrator, EPA Region 10 or the Deputy Regional Administrator under Section XIV (Dispute Resolution), during the period, if any, beginning on the 21st day after the Negotiation Period begins until the date that the Regional Administrator or the Deputy Regional Administrator issues a final decision regarding such dispute. Nothing in this Settlement shall prevent the simultaneous accrual of separate penalties for separate violations of this Settlement.

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59.60. Following EPA's determination that Respondents have failed to comply with a requirement of this Settlement, EPA may give Respondents written notification of the failure and describe the noncompliance. EPA may send Respondents a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Respondents of a violation.

60.61. All penalties accruing under this Section shall be due and payable to EPA within 30 days after Respondents' receipt from EPA of a demand for payment of the penalties, unless Respondents invoke the Dispute Resolution procedures under Section XIV (Dispute Resolution) within the 30-day period. All payments to EPA under this Section shall indicate that the payment is for stipulated penalties and shall be made in accordance with ¶ 41 (Payments by Respondents for EPA Future Response Costs).

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~~61-62.~~ If Respondents fail to pay stipulated penalties when due, Respondents shall pay Interest on the unpaid stipulated penalties as follows: (a) if Respondents have timely invoked dispute resolution such that the obligation to pay stipulated penalties has been stayed pending the outcome of dispute resolution, Interest shall accrue from the date stipulated penalties are due pursuant to ¶ 60 until the date of payment; and (b) if Respondents fail to timely invoke dispute resolution, Interest shall accrue from the date of demand under ¶ 62 until the date of payment. If Respondents fails to pay stipulated penalties and Interest when due, the United States may institute proceedings to collect the penalties and Interest.

~~62-63.~~ The payment of penalties and Interest, if any, shall not alter in any way Respondents' obligation to complete performance of the Work required under this Settlement.

~~63-64.~~ Nothing in this Settlement shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondents' violation of this Settlement or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA, 42 U.S.C. § 9622(l), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3); provided, however, that EPA shall not seek civil penalties pursuant to Section 122(l) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided in this Settlement, except in the case of a willful violation of this Settlement or in the event that EPA assumes performance of a portion or all of the Work pursuant to ¶ ~~73~~ 32 (Work Takeover).

~~64-65.~~ Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Settlement.

#### ~~XVIII.~~XVII. COVENANTS BY EPA

~~65-66.~~ **Covenants for Respondents by EPA.** Except as provided in Section XVIII (Reservation of Rights by EPA), EPA covenants not to sue or to take administrative action against Respondents pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for the Work performed and EPA Future Response Costs paid. These covenants shall take effect upon the Effective Date. These covenants are conditioned upon the complete and satisfactory performance by Respondents of their obligations under this Settlement. These covenants extend only to Respondents and do not extend to any other person.

~~66-67.~~ **Covenants for SFAs by EPA.** Except as provided in Section XVIII (Reservation of Rights by EPA), EPA covenants not to take administrative action against the SFAs pursuant to Sections 106 and 107(a) of CERCLA, 42 USC §§ 9606 and 9607(a), for the Work performed and EPA Future Response Costs, paid. This covenant shall take effect upon the Effective Date. This covenant is conditioned upon the satisfactory performance by the United States on behalf of the SFAs of their obligations under this Settlement. EPA's covenant extends only to SFAs and does not extend to any other person.

~~67-68.~~ **Covenants for Settling Public Entities by EPA.** Except as provided in Section XVIII (Reservation of Rights by EPA), ¶ 70, EPA covenants not to sue or to take administrative

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action against a Settling Public Entity pursuant to Section 107(a) of CERCLA, 42 USC §9607(a), for payments paid by that Settling Public Entity pursuant to Section XIII, ¶¶ 38, 39, and 40 of this Settlement. These covenants are conditioned upon the complete and satisfactory performance by the Settling Public Entity of its payment obligations under this Settlement, as described in : ¶¶ 38, 39, and 40.

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#### **XIX.XVIII. RESERVATIONS OF RIGHTS BY EPA**

~~68.~~69. Except as specifically provided in this Settlement, nothing in this Settlement shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants, or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing in this Settlement shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Settlement, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondents in the future to perform additional activities pursuant to CERCLA or any other applicable law.

~~69.~~70. The covenants set forth in Section XVII (Covenants by EPA) above do not pertain to any matters other than those expressly identified therein. EPA reserves, and this Settlement is without prejudice to, all rights against Respondents, SFAs, and Settling Public Entities with respect to all other matters, including, but not limited to:

- a. liability for failure by a Respondent, the United States on behalf of the SFAs, or a Settling Public Entity to meet a requirement of that Party under this Settlement;
- b. liability for costs not included within the definition of EPA Future Response Costs;
- c. liability for performance of response action other than the Work;
- d. criminal liability;
- e. liability for violations of federal or state law that occur during or after implementation of the Work;
- f. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- g. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site; and
- h. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site and not paid as EPA Future Response Costs under this Settlement.

~~70.~~71. In the event Respondents fail to complete the obligations to perform 100% of the RD for the Swan Island Project Area, EPA reserves, -and this Settlement is without prejudice to,

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all rights against the Settling Public Agencies along with other potentially responsible parties for liability to perform the RD.

#### 71.72. **Work Takeover**

a. In the event EPA determines one of the following with respect to Respondents' performance:- (1) Respondents have ceased implementation of any portion of the Work; (2) Respondents are seriously or repeatedly deficient or late in their performance of the Work; or (3) Respondents are implementing the Work in a manner that may cause an endangerment to human health or the environment, EPA may issue a written notice (Work Takeover Notice) to Respondents. Any Work Takeover Notices issued by EPA (which writing may be electronic) will specify the grounds upon which such notice was issued and will provide Respondents a period of 10 days within which to remedy the circumstances giving rise to EPA's issuance of such notice.

b. If, after expiration of the 10-day notice period specified in ¶ 732.a Respondents have not remedied to EPA's satisfaction the circumstances giving rise to EPA's issuance of the relevant Work Takeover Notice, EPA may at any time thereafter assume the performance of all or any portion(s) of the Work as EPA deems necessary (Work Takeover). EPA will notify Respondents in writing (which writing may be electronic) if EPA determines that implementation of a Work Takeover is warranted under this ¶ 732.b. Funding of Work Takeover costs is addressed under ¶ 986 (Access to Financial Assurance).

c. Respondents may invoke the procedures set forth in ¶ 48 (Formal Dispute Resolution) to dispute EPA's implementation of a Work Takeover under ¶ 732.b. However, notwithstanding Respondents' invocation of such dispute resolution procedures, and during the pendency of any such dispute, EPA may in its sole discretion commence and continue a Work Takeover under ¶ 732.b until the earlier of (1) the date that Respondents remedy, to EPA's satisfaction, the circumstances giving rise to EPA's issuance of the relevant Work Takeover Notice, or (2) the date that a written decision terminating such Work Takeover is rendered in accordance with ¶ 48 (Formal Dispute Resolution).

d. Notwithstanding any other provision of this Settlement, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

#### XX.XIX. **COVENANTS BY RESPONDENTS, SFAs and SETTLING PUBLIC ENTITIES**

72.73. **Covenants by Respondents.** Except for any claims that may arise if SFAs fail to complete their obligations under this Settlement Agreement, Respondents each covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, EPA Future Response Costs, and this Settlement, including, but not limited to the following:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund through Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

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b. any claim under Sections 107 and 113 of CERCLA, Section 7002(a) of RCRA, 42 U.S.C. § 6972(a), or state law relating to the Work, EPA Future Response Costs, and this Settlement; or any claim arising out of response actions at or in connection with the Swan Island Basin Project Area relating to the Work, EPA Future Response Costs, and this Settlement, including any claim under the United States Constitution, the Oregon Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, or at common law.

**73.74. Covenants by SFAs.** SFAs agree not to assert any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund through Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 USC §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law with respect to the Work, EPA Future Response Costs, and this Settlement. This covenant does not preclude demand for reimbursement from the Superfund of costs incurred by a SFA in the performance of its duties (other than pursuant to this Settlement) as lead or support agency under the National Contingency Plan (40 C.F.R. Part 300).

**74.75. Covenants by Settling Public Entities.** Except for any claims that may arise if SFAs fail to complete their obligations under this Settlement Agreement, Settling Public Entities each covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, EPA Future Response Costs, and this Settlement, including, but not limited to the following:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund through Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim under Sections 107 and 113 of CERCLA, Section 7002(a) of RCRA, 42 U.S.C. § 6972(a), or state law relating to the Work, EPA Future Response Costs, and this Settlement; or

c. any claim arising out of response actions at or in connection with the Swan Island Basin Project Area relating to the Work, EPA Future Response Costs, and this Settlement, including any claim under the United States Constitution, the Oregon Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 USC § 2412, or at common law.

**75.76.** These covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to any of the reservations set forth in Section XVIII (Reservations of Rights by EPA), other than in ¶ 71.a (liability for failure to meet a requirement of the Settlement), 71.d (criminal liability), or 71.e (violations of federal/state law during or after implementation of the Work), but only to the extent that Respondents' and Settling Public Entities' claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

**76.77.** Nothing in this Settlement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

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~~77-78.~~ Respondents and Settling Public Entities each reserve, and this Settlement is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, and brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States, as that term is defined in 28 U.S.C. § 2671, while acting within the scope of his or her office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, the foregoing shall not include any claim based on EPA's selection of response actions, or the oversight or approval of Respondents' deliverables or activities.

#### ~~XXI.~~XX. OTHER CLAIMS

~~78-79.~~ By issuance of this Settlement, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondents. The United States or EPA shall not be deemed a party to any contract entered into by Respondent or its directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Settlement.

~~79-80.~~ Except as expressly provided in Section XIX (Covenants by Respondents, SFAs, and Settling Public Entities) and Section XVII (Covenants by EPA), nothing in this Settlement constitutes a satisfaction of or release from any claim or cause of action against Respondents or any person not a party to this Settlement for any liability such person may have under CERCLA, other statutes, or common law, including but not limited to any claims of the United States for costs, damages, and interest under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607.

~~80-81.~~ No action or decision by EPA pursuant to this Settlement shall give rise to any right to judicial review, except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

#### ~~XXII.~~XXI. EFFECT OF SETTLEMENT/CONTRIBUTION

~~81-82.~~ Nothing in this Settlement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Settlement. Except as provided in Section XIX (Covenants by Respondents, SFAs, Settling Public Entities), each of the Parties expressly reserves any and all rights (including, but not limited to, pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action that each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this Settlement diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

~~82-83.~~ The Parties agree that this Settlement constitutes an administrative settlement pursuant to which each Respondent and each SFA has, as of the Effective Date, resolved liability to the United States within the meaning of Sections 113(f)(2) and 122(h)(4) of CERCLA, 42

U.S.C. §§ 9613(f)(2) and 9622(h)(4), and is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, or as may be otherwise provided by law, for the “matters addressed” in this Settlement. The “matters addressed” in this Settlement for the purpose of this Paragraph are the Work and EPA Future Response Costs

83-84. The Parties agree that this Settlement constitutes an administrative settlement pursuant to which each Settling Public Entity has, as of the Effective Date, resolved liability to the United States for payments paid by that Settling Public Entity pursuant to Section XIII, ¶¶ 38, 39, and 40 of this Settlement within the meaning of Section 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), and is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, or as may be otherwise provided by law, for the “matters addressed” in this Settlement. The “matters addressed” in this Settlement for the purpose of this Paragraph are the payments paid by that Settling Public Entity pursuant to Section XIII, ¶¶ 38, 39, and 40 of this Settlement.

84-85. The Parties further agree that this Settlement constitutes an administrative settlement pursuant to which each Respondent and each SFA has, as of the Effective Date, resolved its liability to the United States within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

85-86. The Parties further agree that this Settlement constitutes an administrative settlement pursuant to which each Settling Public Entity has, as of the Effective Date, resolved its liability to the United States for payments paid by that Settling Public Entity pursuant to Section XIII, ¶¶ 38, 39, and 40 of this Settlement, within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

86-87. Except with respect to litigation between a Respondent or a Settling Public Entity and any of its insurers or alleged insurers, each Respondent and Settling Public Entity shall, with respect to any suit or claim brought by it for matters related to this Settlement, notify EPA in writing no later than 60 days prior to the initiation of such suit or claim. Each Respondent and Settling Public Entity also shall, with respect to any suit or claim brought against it for matters related to this Settlement, notify EPA in writing within 10 days after service of the complaint or claim upon it. In addition, each Respondent and Settling Public Entity shall notify EPA within 10 days after service or receipt of any Motion for Summary Judgment and within 10 days after receipt of any order from a court setting a case for trial, for matters related to this Settlement.

87-88. In any subsequent administrative or judicial proceeding initiated by EPA, or by the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other relief relating to the Site, Respondents and Settling Public Entities shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant by EPA set forth in Section XVII (Covenants by EPA).

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## ~~XXIII.~~XXII. INDEMNIFICATION

~~88-89.~~ The United States does not assume any liability by entering into this Settlement or by virtue of any designation of Respondents as EPA's authorized representatives under Section 104(e) of CERCLA, 42 U.S.C. § 9604(e), and 40 C.F.R. § 300.400(d)(3). Respondents shall indemnify, save, and hold harmless the United States, its officials, agents, employees, contractors, subcontractors, employees, and representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, or subcontractors, and any persons acting on Respondents' behalf or under their control, in carrying out activities pursuant to this Settlement. Further, Respondents agree to pay the United States all costs it incurs, including, but not limited to attorneys' fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States based on negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Settlement. The United States shall not be held out as a party to any contract entered into, by, or on behalf of Respondents in carrying out activities pursuant to this Settlement. Neither Respondents nor any such contractor shall be considered an agent of the United States.

~~89-90.~~ The United States shall give Respondents notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondents prior to settling such claim.

~~90-91.~~ With the exception of any claims that may arise if SFAs fail to complete their obligations under this Settlement, Respondents covenants not to sue and agrees not to assert any claims or causes of action against the United States for damages or reimbursement or for set-off of any payments made, or to be made, to the United States, arising from or on account of any contract, agreement, or arrangement between Respondents and any person for performance of Work on or relating to the Swan Island Basin Project Area, including, but not limited to, claims on account of construction delays. In addition, Respondents shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of, any contract, agreement, or arrangement between Respondents and any person for performance of Work on or relating to the Swan Island Basin Project Area, including, but not limited to, claims on account of construction delays.

Commented [SIBRD GRP44]: Willamette Cove ASAO

## ~~XXIV.~~XXIII. INSURANCE

~~91-92.~~ No later than 15 days before commencing any on-site Work, Respondents shall secure, and shall maintain until so notified by EPA, commercial general liability insurance with limits of liability of \$1 million per occurrence, and automobile insurance with limits of liability of \$1 million per accident, and umbrella liability insurance with limits of liability of \$5 million in excess of the required commercial general liability and automobile liability limits, naming EPA as an additional insured with respect to all liability arising out of the activities performed by or on behalf of Respondents pursuant to this Settlement. In addition, for the duration of the Settlement, Respondents shall provide EPA with certificates of such insurance and a copy of each insurance policy. Respondents shall resubmit such certificates and copies of policies each

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year on the anniversary of the Effective Date. In addition, for the duration of the Settlement, Respondents shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Respondents in furtherance of this Settlement. If Respondents demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks but in a lesser amount, Respondents need provide only that portion of the insurance described above that is not maintained by the contractor or subcontractor. Respondents shall ensure that all submittals to EPA under this Paragraph identify the Site name, City, State and the EPA docket number for this action.

#### ~~XXV.~~XXIV. FINANCIAL ASSURANCE

~~93. In order to ensure the completion of the Work, Respondent(s) shall secure financial assurance in the amount of \$43 million ("Estimated Cost of the Work"), for the benefit of EPA. The financial assurance must be one or more of the mechanisms listed below, in a form substantially identical to the relevant sample documents available from EPA or under the "Financial Assurance - Settlements" category on the Cleanup Enforcement Model Language and Sample Documents Database at <https://cfpub.epa.gov/compliance/models/>, and satisfactory to EPA. Respondent may use multiple mechanisms if they are limited to surety bonds guaranteeing payment, letters of credit, trust funds, and/or insurance policies.;~~

~~92. Within 60 days of the Effective Date, and on the anniversary of the Effective Date every year thereafter until 90 days after approval of the Final Basis of Design Report is received from EPA, Respondents and Settling Public Entities shall establish and maintain financial security for the benefit of EPA in the initial amount of \$ \_\_\_\_\_ in one or more of the mechanisms listed in subparagraphs a. to f. below, in order to secure the full and final completion of Work by Respondents. Within 90 days of approval of the Final Basis of Design Report by EPA, and on the anniversary of the Effective Date every year thereafter until Notice of Completion of the Work in accordance with Section XXVIII below is received from EPA, Respondents and Settling Public Entities shall establish and maintain financial security for the benefit of EPA in an amount to be approved in writing by EPA based on Respondents' estimated cost to complete the Remedial Design Work remaining at that time as EPA may approve in writing. The financial assurance must be one or more of the mechanisms listed below, in a form substantially identical to the relevant sample documents available from EPA or under the "Financial Assurance - Settlements" category on the Cleanup Enforcement Model Language and Sample Documents Database at <https://cfpub.epa.gov/compliance/models/>, and satisfactory to EPA. Respondents may use multiple mechanisms if they are limited to surety bonds guaranteeing payment, letters of credit, trust funds, and/or insurance policies.~~

a. A surety bond guaranteeing payment and/or performance of the Work that is issued by a surety company among those listed as acceptable sureties on federal bonds as set forth in Circular 570 of the U.S. Department of the Treasury;

b. An irrevocable letter of credit, payable to or at the direction of EPA, that is issued by an entity that has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a federal or state agency;

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c. A trust fund established for the benefit of EPA that is administered by a trustee that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency;

d. A policy of insurance that provides EPA with acceptable rights as a beneficiary thereof and that is issued by an insurance carrier that has the authority to issue insurance policies in the applicable jurisdiction(s) and whose insurance operations are regulated and examined by a federal or state agency;

e. A demonstration by a Respondent that it meets the financial test criteria of ¶ 953, accompanied by a standby funding commitment, which obligates the affected Respondent to pay funds to or at the direction of EPA, up to the amount financially assured through the use of this demonstration in the event of a Work Takeover; or

f. A guarantee to fund or perform the Work executed in favor of EPA by a company: (1) that is a direct or indirect parent company of a Respondent or has a “substantial business relationship” (as defined in 40 C.F.R. § 264.141(h)) with a Respondent; and (2) can demonstrate to EPA’s satisfaction that it meets the financial test criteria of ¶ 953.

94. Respondents and Settling Public Entities have selected, and EPA has found satisfactory, a trust fund established pursuant to ¶ 934.c. above and liquid FA under ¶ above as initial forms of financial assurance. Within 30 days after the Effective Date, Respondents and Settling Public Entities shall secure all executed and/or otherwise finalized mechanisms or other documents consistent with the EPA-approved form of financial assurance and shall submit such mechanisms and documents to the EPA Project Coordinator.

a. Trust Fund. The Account (as defined at ¶ 10 above) into which payments made under Section XIII above (Payments of Response Costs) are deposited shall name EPA as beneficiary such that EPA can immediately access funds in the account in the event of a Work Takeover under under ¶ 723.b.

b. [Liquid FA]. The [liquid FA instrument] shall be in the amount of \$12 million, the approximate difference between funds being deposited into the Account pursuant to this Settlement and the Estimated Cost of the Work.

93. Each Respondent and Settling Public Entity shall, within 30 days of the Effective Date, obtain EPA’s approval of the form of financial assurance each Respondent and Settling Public Entity obtains. Within 30 days of such approval, each Respondent and Settling Public Entity shall secure all executed and/or otherwise finalized mechanisms or other documents consistent with the EPA-approved form of financial assurance and shall submit such mechanisms and documents to the EPA Region 10 Office of Regional Counsel, 1200 Sixth Avenue, Suite 1555, M/S 11 C07, Seattle, WA 98101.

94.95. Respondents seeking to provide financial assurance by means of a demonstration under ¶ 934.e, or Respondents seeking to provide financial assurance by means of a guarantee under ¶ 934.f, must, within 30 days of the Effective Date:

a. Demonstrate that:

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- (1) The affected Respondent or guarantor has:
  - i. Two of the following three ratios: a ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5; and
  - ii. Net working capital and tangible net worth each at least six times the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; and
  - iii. Tangible net worth of at least \$10 million; and
  - iv. Assets located in the United States amounting to at least 90 percent of total assets or at least six times the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; or
- (2) The affected Respondent or guarantor has:
  - i. A current rating for its senior unsecured debt of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A or Baa as issued by Moody's; and
  - ii. Tangible net worth at least six times the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; and
  - iii. Tangible net worth of at least \$10 million; and
  - iv. Assets located in the United States amounting to at least 90 percent of total assets or at least six times the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; and

b. Submit to EPA for the affected Respondent-, or guarantor: -(1) a copy of an independent certified public accountant's report of the entity's financial statements for the latest completed fiscal year, which must not express an adverse opinion or disclaimer of opinion; and (2) a letter from its chief financial officer and a report from an independent certified public

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accountant substantially identical to the sample letter and reports available from EPA or under the “Financial Assurance - Settlements” subject list category on the Cleanup Enforcement Model Language and Sample Documents Database at <https://cfpub.epa.gov/compliance/models/>.

95-96. Respondents providing financial assurance by means of a demonstration under ¶ 931.e, or Respondents providing financial assurance by means of a guarantee under 931.f, must also:

- a. Annually resubmit the documents described in ¶ 953.b within 90 days after the close of the affected Respondent’s or guarantor’s fiscal year;
- b. Notify EPA within 30 days after the affected Respondent or guarantor determines that it no longer satisfies the relevant financial test criteria and requirements set forth in this Section; and
- c. Provide to EPA, within 30 days of EPA’s request, reports of the financial condition of the affected Respondent or guarantor in addition to those specified in ¶ 593.b; EPA may make such a request at any time based on a belief that the affected Respondent or guarantor may no longer meet the financial test requirements of this Section.

96-97. Respondents shall each diligently monitor the adequacy of their own financial assurance. If Respondents become aware of any information indicating that the financial assurance they provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, the affected Respondent shall notify EPA of such information within 7 days. If EPA determines that the financial assurance provided by any Respondent under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, EPA will notify the affected Respondent of such determination. The affected Respondent shall, within 30 days after notifying EPA or receiving notice from EPA under this Paragraph, secure and submit to EPA for approval a proposal for a revised or alternative financial assurance mechanism that satisfies the requirements of this Section. EPA may extend this deadline for such time as is reasonably necessary for the affected Respondent, in the exercise of due diligence, to secure and submit to EPA a proposal for a revised or alternative financial assurance mechanism, not to exceed 60 days. The affected Respondent shall follow the procedures of ¶ 996 (Modification of Amount, Form, or Terms of Financial Assurance) in seeking approval of, and submitting documentation for, the revised or alternative financial assurance mechanism. A Respondent’s inability to secure financial assurance in accordance with this Section does not excuse performance of any other obligation under this Settlement.

#### 97-98. Access to Financial Assurance

- a. If EPA issues a notice of implementation of a Work Takeover under ¶ 732.b, then, in accordance with any applicable financial assurance mechanism and/or related standby funding commitment, EPA is entitled to: -(1) the performance of the Work; and/or (2) require that any funds guaranteed be paid in accordance with ¶ 9896.d.
- b. If EPA is notified by the issuer of a financial assurance mechanism that it intends to cancel such mechanism, and the affected that is relying on that mechanism fails to provide an alternative financial assurance mechanism in accordance with this Section at least 30

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days prior to the cancellation date, the funds guaranteed under such mechanism must be paid prior to cancellation in accordance with ¶ 986.d.

c. If, upon issuance of a notice of implementation of a Work Takeover under ¶ 732.b, either: (1) EPA is unable for any reason to promptly secure the resources guaranteed under any applicable financial assurance mechanism and/or related standby funding commitment, whether in cash or in kind, to continue and complete the Work; or (2) the financial assurance is a demonstration or guarantee under ¶ 934.e or 934.f, then EPA is entitled to demand an amount, as determined by EPA, sufficient to cover the cost of the remaining Work to be performed. In particular, if the Account (in conjunction with the liquid FA instrument) contains insufficient funding to complete the work assumed by EPA, Respondent(s) shall, within 30 days of such demand, pay the amount demanded as directed by EPA: in immediately available funds and without setoff, counterclaim, or condition of any kind, a cash amount so that EPA receives up to but does not exceed the estimated cost of completing the remaining Work, as determined by EPA.

d. Any amounts required to be paid under this ¶ 9896 shall be, as directed by EPA: (i) paid to EPA in order to facilitate the completion of the Work by EPA or by another person; or (ii) deposited into an interest-bearing account, established at a duly chartered bank or trust company that is insured by the FDIC, in order to facilitate the completion of the Work by another person. If payment is made to EPA, EPA may deposit the payment into the EPA Hazardous Substance Superfund or into the Portland Harbor Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

e. All EPA Work Takeover costs not paid under this ¶ 9896 must be reimbursed as EPA Future Response Costs under Section XIII (Payments for Response Costs).

#### 99. **Modification of Amount, Form, or Terms of Financial Assurance.**

Respondents may submit, on any anniversary of the Effective Date or at any other time agreed to by the Parties, a request to reduce the amount, or change the form or terms, of the financial assurance mechanism. ~~The amount of a Respondent's financial assurance shall be reduced in the amount already paid by that Party under Section XIII.~~ Any such request must be submitted to EPA in accordance with ¶ 942, and must include an estimate of the cost of the remaining Work, an explanation of the bases for the cost calculation, and a description of the proposed changes, if any, to the form or terms of the financial assurance. EPA will notify of its decision to approve or disapprove a requested reduction or change pursuant to this Paragraph. Respondents may reduce the amount of the financial assurance mechanism only in accordance with: (a) EPA's approval; or (b) if there is a dispute, the agreement or written decision resolving such dispute under Section XIV (Dispute Resolution). Respondents may change the form or terms of the financial assurance mechanism only in accordance with EPA's approval. Any decision made by EPA on a request submitted under this Paragraph to change the form or terms of a financial assurance mechanism shall not be subject to challenge by Respondents pursuant to the dispute resolution provisions of this Settlement or in any other forum. Within 30 days after receipt of EPA's approval of, or the agreement or decision resolving a dispute relating to, the

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requested modifications pursuant to this Paragraph, Respondents shall submit to EPA documentation of the reduced, revised, or alternative financial assurance mechanism in accordance with ¶ 942.

#### **98-100. Release, Cancellation, or Discontinuation of Financial Assurance.**

Respondents may release, cancel, or discontinue any financial assurance provided under this Section only as follows: (a) in accordance with EPA's approval of such release, cancellation, or discontinuation; or (b) if there is a dispute regarding the release, cancellation, or discontinuance of any financial assurance, in accordance with the agreement or final decision resolving such dispute under Section XIV (Dispute Resolution)].

### **XXVI-XXV. INTEGRATION/APPENDICES**

99-101. This Settlement and its appendices constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Settlement. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Settlement. Notwithstanding the two foregoing representations, the Port of Portland and Vigor have entered into two agreements, the 2000 Sale Agreement and the 2020 Letter Agreement, that related to certain understandings and agreements embodied in Section XXI (Effect of Settlement/Contribution) of this Settlement. The following appendices are attached to and incorporated into this Settlement:

- a. Appendix A is the SOW.
- b. Appendix B is a map of the Swan Island Basin Project Area

### **XXVII-XXVI. MODIFICATION**

100-102. The EPA Project Coordinator may modify the SOW or related deliverables as provided in ¶ 19 (**Modification of SOW or Related Deliverables**). Any other requirements of this Settlement may be modified in writing by mutual agreement of the parties.

**Commented [SIBRD GRP45]:** Willbridge Cove and River Mile 10 West ASAOCs

101-103. If Respondents seek permission to deviate from any approved work plan, schedule, or SOW, Respondents' Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis. Respondents may not proceed with the requested deviation until receiving oral or written approval from the EPA Project Coordinator pursuant to ¶ 1023100.

102-104. No informal advice, guidance, suggestion, or comment by the EPA Project Coordinator or other EPA representatives regarding any deliverable submitted by Respondents shall relieve Respondents of its obligation to obtain any formal approval required by this Settlement, or to comply with all requirements of this Settlement, unless it is formally modified.

### **XXVIII-XXVII. SETTLING PUBLIC ENTITY STATE OF OREGON**

**Commented [SIBRD GRP46]:** Willamette Cove ASAOC and ICIAP/IMP ASAOC.

103-105. Notwithstanding anything in this Settlement to the contrary, nothing in this Settlement is to be construed to permit or require the State of Oregon to take any action that

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exceeds the scope of its authority, or to violate Article XI, § 7 of the Oregon Constitution or any other law regulating liabilities or monetary obligations.

#### ~~XXIX~~XXVIII. NOTICE OF WORK COMPLETION

~~104~~106. When EPA determines that all Work has been fully performed in accordance with this Settlement, with the exception of any continuing obligations as provided in ¶1096, EPA will provide written notice to Respondents, SFAs, and Settling Public Entities. Respondents may request that EPA make this determination.

~~105~~107. If EPA determines that any such Work has not been completed in accordance with this Settlement, EPA will notify Respondents, SFAs, Settling Public Entities, provide a list of the deficiencies, and require that Respondents modify the RD Work Plan if appropriate to correct such deficiencies. Respondents shall implement the modified and approved RD Work Plan and shall submit a modified Final RD Report for EPA approval in accordance with the EPA notice. If approved, EPA will issue the Notice of Work Completion.

~~106~~108. Issuance of the Notice of Work Completion does not affect the following continuing obligations: (1) obligations under Sections IX (Property Requirements), (2) Section X (Access to Information), (3) Section and XI (Record Retention); and (43) reimbursement of EPA Future Response Costs under Section XIII (Payment of Response Costs) of the Settlement.

#### ~~XXX~~XXIX. EFFECTIVE DATE

This Settlement shall be effective upon signature by the Superfund and Emergency Management Division, EPA Region 10.

**IT IS SO AGREED AND ORDERED;**

**U.S. ENVIRONMENTAL PROTECTION AGENCY:**

Dated \_\_\_\_\_

\_\_\_\_\_  
[NAME AND TITLE]  
Superfund and Emergency Management Division  
EPA Region 10

Signature Page for Settlement regarding the Portland Harbor Superfund Site

**FOR** \_\_\_\_\_ :  
[Print name of Respondent]

\_\_\_\_\_  
Dated

\_\_\_\_\_  
[Name]  
[Title]  
[Company]  
[Address]

